Supreme Court, U. S.
FILED
MAY 13 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-B-355 76-1603

JULIAN H. MENDOZA,

Petitioner,

VERSUS

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

NO. 76-B-355

JULIAN H. MENDOZA,

Petitioner,

VERSUS

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, JULIAN H. MENDOZA, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 28, 1977, and its order denying Rehearing on April 11, 1977.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit on original submission of the cause, as well as Memorandum of the trial court are printed in Appendix, beginning at pages A-1 and A-5, respectively. The notice of the Order denying petition for rehearing is contained in the said Appendix on page A-15.

JURISDICTION

The judgment of the United States Court of Appeals was entered and delivered on February 28, 1977; a timely petition for rehearing was denied by order of the United States Court of Appeals on April 11, 1977. This petition was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the warrantless stop and search of the defendant's vehicle was lawful in light of factual circumstances following an informant's tip?

STATEMENT OF THE CASE

Appellant had been charged by grand jury in a two-count indictment with importing a quantity of marijuana in violation of 21 U.S.C.A. 952(a), and possessing the marijuana with intent to distribute in violation of 21 U.S.C.A. 841(a)(1). He urged a Motion to Suppress the evidence by reason of an illegal search, and after an evidentiary hearing, the trial court found Appellant guilty of Count 2. Appellant was assessed three years in the

custody of the Attorney General, with a special parole term of three years.

The search of Appellant's farm truck, on July 15, 1976, occurred just north of U.S. Highway 281, without a warrant and some distance away from the border with Mexico. It had been seen earlier in the night, and had just entered U.S. 281, appearing to come from one of the many farms in the area where summer melon harvest was going on. (SF 29 & 31). The search of Appellant's vehicle occurred at approximately 4:00 o'clock in the morning. An anonymous tip, giving vehicle's description and its activities and based on hearsay information, had been received some ten (10) hours before (SF 5-6), and none of the officers attempted to obtain a judicial warrant (SF 8 & 9).

The Fifth Circuit Court recognizes that the tip did not furnish probable cause as the information given was lacking of requirements for a warrantless search. Appellant argues that the observation of the farm truck by the officers produced no articulable facts or circumstances to justify the stop and search of the vehicle, and cannot serve to corroborate the tip and furnish probable cause.

REASONS FOR GRANTING THE WRIT

A Writ of Certiorari should be granted in this case because it is apparent that the lower courts have departed from the traditional holdings of this Court on the law of search and seizures as enunciated in *Spinelli vs. U.S., 89 S.Ct. 534 (1969).*

The surveillance which followed the receipt of the tip furnished no reasonable suggestion of criminal conduct when the Appellant's actions are observed alone. Otherwise innocent conduct is not imbued with an aura of suspicion by virtue of

informer's tip where such information fails to support the Aguilar requirements. The activity of a farm truck in a farm area at any hour of the night would not suggest criminal conduct in and of itself.

The corroboration referred to by the appellate panel in its opinion is only to information which would otherwise be non-criminal. As in Spinelli, the statement detailing the activity of the accused must be of such sufficiency that a magistrate, if a warrant had been sought, would have relied on something more substantial than a casual rumor circulating in the underworld.

It was the testimony of the arresting officer that the detection of the odor of marijuana was not made until after the vehicle had been detained, the Defendant interrogated, and the vehicle inspected. Therefore, the odor of marijuana, accordingly detected, could not furnish probable cause of the search already being conducted.

The stopping of Defendant's farm truck late in the night in a border farm area did produce grand results, but the stopping was without probable cause, and therefore, offensive to freedom-loving people in this country, even to those living in a remote area of the country in South Texas.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit. Petitioner further prays that an order issue staying mandate.

Respectfully submitted,

L. Aron Pena per M.A.S.

L. Aron Pena
PENA, McDONALD, PRESTIA & ZIPP
P.O. Drawer 54
Edinburg, Texas 78539

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of May, 1977, two copies of the Petition for Writ of Certiorari were mailed, postage prepaid to the Honorable James R. Gough, Assistant United States Attorney, P.O. Box 61129, Houston, Texas 77061 and Honorable Robert H. Bork, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530.

L. Aron Pena per m.a.s.

L. Aron Pena

COUNSEL FOR PETITIONER

UNITED STATES v. MENDOZA

UNITED STATES of America,
Plaintiff-Appellee,

v.

Julian Herrera MENDOZA,
Defendant-Appellant.

No. 76-3860
Summary Calendar.*

United States Court of Appeals,
Fifth Circuit.

Feb. 28, 1977.

By a judgment of the United States District Court for the Southern District of Texas, at Brownsville, Reynaldo G. Garza, Chief Judge, the defendant was convicted of possession of marijuana and he appealed. The Court of Appeals held that although information from informant may not have been sufficient to constitute probable cause, where information was completely verified by surveillance, officers had probable cause to stop truck and to search the same after detecting odor of marijuana emanating thereform.

Affirmed.

Drugs and Narcotics Key 183

Even though tip by informant, a private citizen who had never furnished information in past, concerning importation

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* Rule 18, 5 Cir., *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

of marijuana may not have been enough for probable cause, where the information was fully corroborated by surveillance, officers had probable cause to stop truck being driven by defendant and to search truck without a warrant after detecting odor of marijuana emanating therefrom.

Appeal from the United States District Court for the Southern District of Texas.

Before COLEMAN, GODBOLD and TJOFLAT, Circuit Judges.

PER CURIAM:

Appellant Julian Herrera Mendoza was convicted after a bench trial of possession of 3,931 pounds of marijuana with intent to distribute. On appeal he alleges that the warrantless search here was not a border search, was not attended by exigent circumstances, and was not based on probable cause. Judge Garza considered and rejected all these contentions. He found appellant guilty and sentenced him to three years, with three years special parole.

On July 14, 1976, about 6:00 p.m., Customs Officer Foster received a phone call from an informant concerning an expected importation of marijuana. The informant stated he had overheard a conversation to the effect that on the following morning a stakebed truck would leave Donna, Texas, and travel south on FM 493 to its intersection with Highway 281. It would turn West on 281 and travel toward the Rio Grande River at the Jackson Farms area, a known smuggling point. There the truck would pick up a load of marijuana that would be crossed over from Mexico. The truck was described as a 1974 white Dodge stakebed truck, license number DW 2810. Another vehicle, description unknown, was to accompany the stakebed truck. CB radios would be utilized by the smugglers.

The informant was a private citizen who had never furnished information in the past. However Officer Foster knew that he did not supply the contraband. The information was relayed to other customs officers and surveillance was set up at the intersection FM 493 and Highway 281, which is about ½ mile from the Rio Grande. Around 9:00 p.m. on the 14th, the truck was observed by Officer McAnear at the intersection and as it proceeded down 281. Shortly thereafter, a pickup truck with an elongated cab and a CB antenna passed his location. This same truck reappeared two other times that evening. Only one other truck passed the location that night.

A second surveillance point was located west of the intersection on 281 at the Krenmeuller Road, near the river levee. Officer Perpetua was at this location and had received the information about the previous activities. Around 2:15 a.m. he sighted the pickup on 281. It made about six passes in the area. Perpetua described these as "heat runs", acting as a lookout. Officer Coleman relieved the early shift at the intersection, and he saw the pickup pass his location several times. He started to follow it.

Around 4:40 a.m. Officer Perpetua saw the stakebed truck and the pickup emerging from the area near the river at Jackson Farms, a location between the Krenmeuller Road and the intersection. Both trucks were proceeding east on 281 towards 493. Officer Coleman, coming in the opposite direction, made a U turn to follow the trucks. As he did so the pickup pulled on the shoulder of the road, flashed its lights, and then proceeded off at a high rate of speed. Officer Coleman stated he thought the pickup was trying to divert the customs people from the stakebed truck. The pickup was never apprehended. The stakebed truck was stopped about two miles north of the intersection on 493. Perpetua testified he smelled the odor of marijuana the minute he got out of his car. When the canvas on the back of the truck was removed almost two tons of

marijuana in sacks were found. Appellant, the driver of the truck, was arrested.

Appellant filed a motion to suppress alleging the officers had no probable cause to stop and search him. Though the informant's tip alone might not have been enough for probable cause under *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) the information was fully corroborated by surveillance. Here the officers verified the time, location, vehicle and license number. The fact of two vehicles involvement was noted, as were the trial runs of the pickup. Even if the information supplied did not of itself constitute probable cause, the surveillance furnished any required information. *Weeks v. Estelle*, 5 Cir. 1976, 531 F.2d 780; *United States v. Waddy*, 5 Cir. 1976, 536 F.2d 632. Once the officers had stopped the vehicle, they detected the odor of marijuana, thus furnishing probable cause. *United States v. Torres*, 5 Cir. 1976, 537 F.2d 1299. Since a moving vehicle was involved, under these exigent circumstances, no warrant was required. *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

The judgment of the district court is AFFIRMED.

Synopses, Syllabi and Key Number Classification
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The Synopses, Syllabi and Key Number Classification constitute no part of the opinion of the court.

Adm. Office, U.S. Courts— West Publishing Company, Saint Paul, Minn.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK
April 11, 1977

EDWARD W. WADSWORTH
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA. 70130

TO ALL PARTIES LISTED BELOW:

NO. 76-3860 - USA v. Julian Herrera Mendoza

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Susan M. Gravois
Deputy Clerk

/smg

cc: Mr. L. Aron Pena
Mr. James R. Gough

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	)	
	)	CRIMINAL NUMBER
VERSUS	)	
	)	76-B-355
JULIAN HERRERA MENDOZA	)	

FILED: September 29, 1976

Honorable Edward B. McDonough, Jr., United States Attorney, of Houston, Texas, and Charles Lewis, Assistant United States Attorney, of Brownsville, Texas, for the Government

Pena, McDonald, Prestia & Zipp (L. Aron Pena) of Edinburg, Texas, for the Defendant

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MEMORANDUM AND ORDER

Julian Herrera Mendoza, the Defendant, was indicted by a Grand Jury on two counts. Count 1 charges that on July 15, 1976, the Defendant knowingly and intentionally imported 3,931 pounds of marijuana into the United States from Mexico, in violation of 21 U.S.C. § 952(a). The second count alleges that on the same date, the Defendant did knowingly and intentionally possess, with intent to distribute, 3,931 pounds of

marijuana, contrary to 21 U.S.C. § 841(a)(1). Mendoza pleaded not guilty to both counts, and subsequently filed a Motion to Suppress and a Motion to Disclose Informants.

On August 30, 1976, the Defendant appeared for a hearing on the motions. The Government called four witnesses:

United States Customs Patrol Officers Clifford Foster, Robert McAnear, Romy Perpetua, and Alfredo Coleman. The Government then rested. The Defendant recalled Officer Foster, after which the Defendant, too, rested.

From the testimony presented, this Court finds the evidence to be as follows. On July 14, 1976, at 6 p.m., Officer Foster received a telephone call which revealed details concerning the importation and transportation of marijuana. The caller stated the he had overheard a conversation that day (July 14) in which it was disclosed that sometime during the night, around the early morning hours of July 15, a truck would leave Donna, Texas (about 6 or 7 miles north of the Rio Grande River); it would travel south on FM 493, then progress via Highway 281 to the Rio Grande River, in the Jackson Farms area (a known contraband crossing point). There, the truck would pick up a load of marijuana which was to be crossed from Mexico the same night.

Additional particulars were also furnished. The vehicle was described as a 1974 white Dodge stakebed truck, with License Number DW 2810 (hereinafter referred to as "stakebed truck"). Another truck (hereinafter referred to as "pickup"), the identity of which was unknown to the informer, would also participate in the illicit activities. Furthermore, Citizen Band radios would be utilized by the smugglers.

The caller had never furnished information in the past. He did not mention the Defendant's name, nor did he indicate

that the Defendant was present during the conversation which he overheard. Officer Foster knows that the informer did not supply the contraband. The information was passed by Officer Foster to his supervisor.

FM 493, a north-south road, dead-ends at 281, an east-west highway; the 493-281 intersection is about a half mile from the Rio Grande River. Officer McAnear, who had been briefed on the data supplied by the informer, established a surveillance post about 50 feet west of 493 and 100 feet north of 281. At 9:05 p.m., McAnear observed the previously described stakebed truck proceed south on 493, from the direction of Donna, Texas, precisely as outlined by the informer; it then turned west on 281. McAnear's partner followed the stakebed truck briefly on 281 and returned to McAnear's location. Aware that a second vehicle might be in the area, McAnear noted that a pickup truck – with a "stretch cab" and a C.B. radio antenna – passed his location on three separate occassions. Only one other truck (aside from the two suspect vehicles) passed McAnear's surveillance location between the hours of 8 p.m. and midnight; the traffic was particularly slow that night.

Officer Perpetua set up a second surveillance position at around 2 a.m. (July 15), near the intersection of 281 and Krenmueller Road; the latter road runs south from 281 over the river levee to the Rio Grande and is west of the 493-281 intersection. Perpetua had been advised about the information furnished by the informer. In addition, he obtained a description of the pickup truck, which had been sighted earlier by the other officers. At 2:15, the pickup was seen traveling on 281, and a total of approximately six passes were eventually made by the pickup. The pickup appeared to Perpetua to be making "heat runs"; that is, it was acting as a lookout, attempting to determine if law enforcement officials were present.

Officer Perpetua confirmed that the vicinity of Jackson Farms is a well known contraband area. And on the particular night in question, no farming or other legitimate activity was in progress.

Officer Coleman relieved the earlier shift which was on surveillance near the intersection of 493 and 281. He, too, saw the pickup truck pass his location several times. Moreover, it always came south on 493; it never went north on that road. After the last time the pickup passed, Coleman decided to follow to acquire the license number. Accordingly, he proceeded south on 493 and turned west on 281.

At this time (about 4:40 a.m.), Officer Perpetua spotted the stakebed truck and the pickup emerging from the river area on Jackson Farms Road. Jackson Farms Road meets 281 at a point between the 493-281 intersection and the intersection of 281 and Krenmueller Road. The stakebed truck was fully visible in the headlights of the pickup, and both trucks turned east on 281, heading toward FM 493. Officer Coleman, heading west, passed the two vehicles, then made a U-turn to follow them. The pickup pulled to the side of the road, flashed his lights, then continued east on 281 at a high rate of speed. A United States Customs Patrol vehicle pursued the pickup, but was unable to overtake it.

Meanwhile, the stakebed truck turned left off of 281 onto 493. Both Perpetua and Coleman followed, and they stopped the vehicle about two miles north of the 493-281 junction. Perpetua stepped out of his car, and he immediately smelled a strong odor of marijuana. Upon removing a canvas which was over the bed of the truck, numerous sacks of marijuana were revealed. The driver of the truck was Julian Herrera Mendoza, the Defendant; he was then placed under arrest.

By his Motion to Suppress, the Defendant asserts that the

search was conducted without probable cause, and that therefore his arrest and the seizure of the marijuana were illegal. In light of applicable legal principles, this assertion does not survive scrutiny.

First, probable cause clearly *did* exist. "Probable cause exists when the facts and circumstances warrant a reasonably prudent man to believe that the vehicle contains contraband." *United States v. Nieto*, 510 F.2d 1118, 1119-1120 (C.A. 5, 1975), cert. denied, 423 U.S. 854 (1975). Since the "facts and circumstances" in this case relate in part to the informer's tip, the two-pronged test of *Aguilar* – that is, the credibility of the informer and the reliability of his information – must be supported by the evidence. *Aguilar v. Texas*, 378 U.S. 108, 114 (1964).

In *United States v. Harris*, 403 U.S. 573 (1971), the Supreme Court ruled that credibility can be demonstrated in several ways, including a showing of factual detail furnished by the informant which is corroborated by personal observations of the law enforcement officers. In the instant case, the informant provided precise and abundant details: the vehicle to be used to carry marijuana was described with considerable particularity; and the timing of the illicit transaction, the route of the truck, and the involvement of the second vehicle were also outlined. Furthermore, as in *Draper v. United States*, 306 U.S. 307, 313 (1959), the officers ". . . personally verified every facet of the information given . . ." them by the informant – except whether the mission on the banks of the Rio Grande River had been accomplished. Having personally verified the numerous facts, and having observed the trucks emerge from the river area, the officers obviously had "reasonable grounds" to believe that the stakebed truck was loaded with marijuana.

Evidence concerning the underlying facts which proved the

reliability of the information is equally conclusive. The informant obtained the information firsthand: he overheard a conversation in which the scheme was discussed. In addition, the particulars of his tip were independently verified by several government officers. *Weeks v. Estelle*, 509 F.2d 760, 765 (C.A. 5, 1975), cert. denied, 423 U.S. 872 (1975).

Even if the informant's tip is deemed defective – contrary to the above, express holding of this Court – the information gathered by the investigating officers was itself sufficient to satisfy the test of probable cause. "The details supplied by the informant in the present case were corroborated by independent surveillance. Even if the information supplied did not of itself constitute probable cause, the surveillance furnished any required information." *United States v. Waddy*, 536 F.2d 632, 634 (C.A. 5, 1976). Moreover, by the time the stakebed truck was pulled over, the officers were plainly in possession of facts warranting at least a limited inquiry concerning the driver's early morning activities. And when Officer Perpetua stepped out of his vehicle, he immediately detected a strong odor of marijuana. He thus had probable cause to search the truck. *United States v. Rojas*, _____ F.2d _____ (C.A. 5, 1976) (No. 76-2451, decided September 10, 1976).

Since the search in this case was conducted without a search warrant, probable cause must be accompanied by exigent circumstances. The darkness of early morning, the proximity to the international boundary and the movable vehicle with its sole occupant alerted unquestionably constituted exigent circumstances. *Chambers v. Maroney*, 399 U.S. 42, 51 (1970).

In the alternative, the "border search" doctrine fully supports the search and seizure in this case. Despite the absence of absolute and direct evidence of a border crossing, a sufficient nexus with the border was established. The informer revealed that the marijuana was to be crossed from Mexico to the

United States; also, the officers observed " . . . persons engaged in suspicious activity near . . ." the border area, and whose "movements [were] reasonably related to the border area . . . ." *United States v. Hill*, 430 F.2d 129, 131 (C.A. 5, 1970). In a case involving parallel circumstances, the Court ruled as follows:

> "In the instant case the search occurred six miles from the border, fifteen minutes after border area contact, and upon the basis of an informer's tip and close surveillance. These circumstances create a nexus with the border that is sufficient to make this a border search."

United States v. Steinkoenig, 487 F.2d 225, 228 (C.A. 5, 1973).

In addition, the Customs Patrol Officers clearly " . . . had a reasonable suspicion of violations of the Customs laws." *United States v. Thompson*, 475 F.2d 1359, 1362 (C.A. 5, 1973). The informer's tip indicated that violations of those laws were imminent. The officers also witnessed the early morning maneuvers of the two trucks. Finally, during the entire surveillance period, only one other truck was sighted in the well known smuggling area. See *United States v. Lujan-Miranda*, 535 F.2d 327 (C.A. 5, 1976).

Defendant's Motion to Suppress is hereby denied.

Defendant's second motion urges disclosure of the identity of the informant. Yet, as the Supreme Court of the United States held in *McCray v. Illinois*, 386 U.S. 300 (1967), when the issue concerns the existence of probable cause, rather than guilt or innocence, the identity of the informer need not be disclosed when the Court is convinced that the officers acted upon reliable information supplied by a credible informer. This Court is so convinced.

Defendant did carry the issue one step further, that is, to the question of guilt or innocence. In his motion, he stated, "the testimony of the informant would be relevant and material to the defense of Defendant." However, upon applying the "balancing test" of *Roviaro v. United States*, 353 U.S. 53, 62 (1957), this Court remains unconvinced of the need to disclose the informant's identity. There was *no evidence* that the informant participated in the offense alleged in this case, and " . . . where the evidence shows that an informer is nothing more than an informer and does not participate in the transaction, no disclosure of his identity is required." *United States v. Clark*, 482 F.2d 103, 104 (C.A. 5, 1973). In addition, other than the brief and conjectural assertion of need, Defendant made no proffer whatsoever as to any defense upon which the informant's testimony would have a bearing.

Defendant's Motion to Disclose Informants is hereby denied.

At the conclusion of the hearing, the Defendant waived his right to a jury, in writing and in open court. The Government submitted the case to the Court on Count 2 only. The Defendant asked that his guilt or innocence be determined on the basis of the evidence already presented; additionally, he stipulated that the substance seized was in fact over 3,900 pounds of marijuana and that the chain of custody was properly maintained.

Based upon the evidence adduced at the hearing on the Motion to Suppress and upon the stipulations entered into between the Defendant and the United States Attorney, this Court finds that the Defendant, Julian Herrera Mendoza, did knowingly and intentionally possess, with intent to distribute, approximately 3,931 pounds of marijuana. The evidence disclosed circumstances which support an inference of knowing and intentional possession. Furthermore, because of the large quantity of marijuana involved, intent to distribute can be,

and is, inferred. This Court finds the Defendant guilty beyond a reasonable doubt of the offense charged in Count 2 of the indictment.

The Defendant, Julian Herrera Mendoza, will appear before this Court on September 30, 1976, at 9:30 a.m. for sentencing.

The Clerk will send copies of the Memorandum and Order to the Defendant, his counsel and the United States Attorney.

DONE at Brownsville, Texas, on this the 29th day of September, 1976.

/s/ Reynaldo G. Garza

Reynaldo G. Garza
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
Southern District of Texas
Brownsville Division

UNITED STATES OF AMERICA	)	
	)	
vs.	)	CR. NO. 76-B-355
	)	
JULIAN HERRERA MENDOZA	)	

INDICTMENT

FILED: August 5, 1976

THE GRAND JURY CHARGES:

COUNT I

That on or about July 15, 1976, within the Brownsville Division of the Southern District of Texas, and within the jurisdiction of this Court, JULIAN HERRERA MENDOZA did knowingly and intentionally import into the United States from Mexico approximately three thousand, nine hundred thirty-one (3,931) pounds of marihuana, a controlled substance under Schedule I of the Controlled Substances Act of 1970, contrary to Section 952(a), Title 21, United States Code.

COUNT II

That on or about July 15, 1976, within the Brownsville Division of the Southern District of Texas, and within the jurisdiction of this Court, JULIAN HERRERA MENDOZA did knowingly and intentionally possess, with intent to distri-

bute, approximately three thousand, nine hundred thirty-one (3,931) pounds of marihuana, a controlled substance under Schedule I of the Controlled Substances Act of 1970, contrary to Section 841(a)(1), Title 21, United States Code.

A TRUE BILL:

/s/ illegible
FOREMAN OF THE GRAND JURY

EDWARD B. McDONOUGH, JR.
UNITED STATES ATTORNEY

BY: /s/ John Patrick Smith
JOHN PATRICK SMITH
Assistant United States Attorney

CAUSE NUMBER

76-B-355

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
Brownsville, TEXAS

UNITED STATES OF AMERICA X

VS. X MOTION TO SUPPRESS

JULIAN HERRERA MENDOZA X

FILED: August 26, 1976

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES JULIAN HERRERA MENDOZA, Defendant by and through his Attorney of Record and respectfully moves the Court to suppress all evidence seized as a result of a search of the person and vehicle on the 15th day of July, 1976, and the fruits of the arrest incident to such illegal search. Defendant relies upon the following reasons to support his Motion:

I.

That the Defendant's person was searched as a result of an arrest without probable cause and without valid warrant in violation of the 4th and 14th Amendments of the Constitution of the United States of America. In this connection, Defendant, JULIAN HERRERA MENDOZA, will show the Court that he was arrested without a valid warrant while traveling in a car under circumstances not entitling an officer of the law to arrest a person without probable cause.

II.

That the above search of both the person and the vehicle was therefore illegal and all fruits of this illegal search must be suppressed.

III.

That the arrest incident to such illegal search was illegal and therefore all other statements and evidence gathered as a result of such illegal arrest must necessarily be suppressed.

WHEREFORE, Defendant, JULIAN HERRERA MENDOZA, prays that this Motion be in all things granted.

Respectfully submitted,

PENA, McDONALD, PRESTIA & ZIPP
P.O. Box 54
Edinburg, Texas 78539

By: /s/ L. Aron Pena
L. ARON PENA

ATTORNEYS FOR DEFENDANT

BROWNSVILLE DIVISION

DEFENDANT

JULIAN HERRERA MENDOZA
DOCKET NO. 76-B-355

JUDGMENT AND PROBATION/COMMITMENT ORDER
AO - 245 (6/74)

FILED: October 9, 1976

In the presence of the attorney for the government the defendant appeared in person on this date

MONTH DAY YEAR
September 30, 1976

COUNSEL

___ WITHOUT COUNSEL
However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

_X_ WITH COUNSEL
L. Aron Pena
(Name of counsel)

PLEA

___ GUILTY, and the court being satisfied that there is a factual basis for the plea,

___ NOLO CONTENDERE,

_X_ NOT GUILTY

There being a finding/verdict of

___ NOT GUILTY. Defendant is discharged

_X_ GUILTY. (on August 30, 1976)

FINDING & JUDGMENT

Defendant has been convicted as charged of the offense(s) of possessing approximately 3,931 pounds of marihuana with intent to distribute, in violation of Section 841(a)(1), Title 21, United States Code, as charged in Count 2 of the Indictment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS and a special parole term of THREE (3) YEARS.

SENTENCE OR PROBATION ORDER

Defendant must report to the United States Marshal, Brownsville, Texas, on October 12, 1976, 9:30 a.m., to commence serving his sentence.

SPECIAL CONDITIONS OF PROBATION

On motion of the Government, Count 1 is hereby dismissed.

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

Approved as to Form:

/s/ Charles Lewis
Charles Lewis
Assistant U.S. Attorney

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

_X_ U.S. District Judge
___ U.S. Magistrate

/s/ illegible

Date 10/9/76

STATEMENT

OF

FACTS

[1]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA	:	
	:	
VS.	:	**CRIMINAL NO. 76-B-355**
	:	
JULIAN HERRERA MENDOZA	:	

BEFORE: HON. REYNALDO G. GARZA,
U.S. DISTRICT JUDGE

BROWNSVILLE, TEXAS

APPEARANCES

CHARLES E. LEWIS, ESQ., FOR THE GOVERNMENT

L. ARON PENA, ESQ., FOR THE DEFENDANT

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REPORTER'S TRANSCRIPT OF PROCEEDINGS
OF
AUGUST 30, 1976
AND
SEPTEMBER 30, 1976

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2:02 P.M.

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THE COURT: All right, 76-B-355, JULIAN HERRERA MENDOZA.

We have a Motion to Suppress and a Motion to Disclose the Informant. I will hear the Motion to Suppress first.

Was this a warrantless search and seizure?

MR. LEWIS: If Your Honor will give us just a second to get that file in here.

THE COURT: All right. I thought the Government told me they were ready.

MR. LEWIS: Your Honor, we were this morning but some of these files got out of the courtroom at lunch.

THE COURT: Well, get your secretary to go get you all your files that you had here this morning. Bring all the files that we had here this morning. Just go get them.

MR. LEWIS: I believe we have this one here now, Your Honor.

We would like to call all our witnesses and have them sworn.

THE COURT: All right, call your witnesses.

[3] MR. PENA: And we invoke the Rule, Your Honor please.

THE COURT: All right.

MR. LEWIS: Agent Grahn.

THE COURT: Agent Grahn here? Stand up, come over here and be sworn.

MR. LEWIS: Romy Perpetua.

THE COURT: Perpetua, come up here and be sworn.

MR. LEWIS: Agent Foster, Agent Coleman, Agent Mc Anear.

THE COURT: All right, swear these witnesses.

(Witnesses sworn.)

THE COURT: All right, now the rule has been invoked and you all know what that means now, so step outside until you are called.

Who do you want first?

MR. LEWIS: Your Honor, we would like to have Agent Foster.

THE COURT: Agent who?

MR. LEWIS: Agent Foster.

MR. PENA: Your Honor please, may we have a stipulation from the Government that this was a warrantless search if in

fact it was?

MR. LEWIS: Yes, this was a warrantless [4] search.

THE COURT: Warrantless search already said. That's the reason they are going forward.

Have a seat there, sir.

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CLIFFORD FOSTER, called as a witness by the Government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LEWIS:

Q Will you state your name, please, for the record?

A Clifford Foster.

Q Mr. Foster, with whom are you employed?

THE COURT: How do you spell your last name?

A F-O-S-T-E-R.

THE COURT: Foster.

Q With whom are you employed, sir?

A U.S. Custom's Patrol.

Q How long have you been with that agency?

[4] [5]

A Sixteen years.

Q Okay, sir. I ask you to direct your attention to this past July and specific July 14, 1976. Were you serving as a C.P.O. officer then?

[5] A Yes sir.

Q Did you have occasion to receive a call relating to some contraband that was going to be brought into the country?

A Yes sir.

Q Would you tell us about that, please?

A Approximately 6:00 P.M. I received a telephone call from a person who said that shortly after dark on that evening a truck was going to leave Donna, Texas and go to the river near Jackson Farms which is down 493, the Donna Road, to 281, and then on to the river where he would pick up a load of contraband. Mainly marijuana. He would be accompanied by another vehicle. The description of that vehicle was unknown, but the description of the first vehicle which was to pick up the contraband would be a 1974 white Dodge truck stake bed.

Q Okay. So pursuant to that did you all set up surveillance?

A Yes sir.

Q Did the informer give you the license plate of that truck?

A Yes sir, he did.

Q Do you remember what that license plate was?

A DW-2810.

[5] [6]

Q Okay. Now, pursuant to this information did you [6] out officers to set up surveillance?

A Yes sir. I advised my shift supervisors and surveillance was started.

THE COURT: You received this information from a confidential informant?

A He wasn't a confidential informant at that time, no.

THE COURT: Just a person who gave you information?

A Just a person that gave me information.

THE COURT: Yes. All right.

Q Okay, sir. Had you received information from that person before?

A No.

Q This first time you received information from him?

A Right.

Q But none the less, he did give you several particulars about this truck?

A Right.

Q Did he mention whether or not these trucks would be employing certain types of communication devices?

A Yes, he said although he didn't know the identity of the second truck that both of the vehicles would be using C.B. radios.

[7] Q Okay. Now, what did you do with this information?

A I passed it on to my supervisors.

Q And who was that?

A Bob Mc Anear, I believe, was supervisor that night.

MR. LEWIS: Okay, sir. No further questions.

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CROSS EXAMINATION

BY MR. PENA:

Q Yes sir, Mr. Foster, the call came in 6:00 o'clock on the day or night of the arrest or subsequent arrest, was it?

A It came in at 6:00 o'clock on the 14th.

Q Did the consequent arrest occur that night or the following day?

A Following morning I believe it was.

Q Past midnight then?

A Yes.

Q You had not received information from this person before? Had anyone at the agency of the Custom's office?

A Not to my knowledge, no.

Q Were you acquainted with this individual?

A No sir.

[8] Q Did he indicate to you how he had come about this information?

A Yes. He said he overheard a conversation.

Q Did he say where?

A No, he didn't.

Q Did he say between whom was the conversation?

A No sir.

Q Did he give this information to you by telephone or in person?

A By telephone.

Q Did he indicate when he had received this information.

A No, he said that that day, I believe, as I recall. He said he had overheard this conversation that day.

Q Mr. Foster, did you or anyone in your office regard this information as fairly reliable?

A The only reliability that I put on it was the fact that it was a known contraband crossing where this truck was going, and we have caught several loads of marijuana coming from that location.

Q So in reply, in answer to my question, you did regard the information as fairly reliable?

[8] [9]

A Yes.

Q Did you or anyone make any attempts to obtain a warrant, a judicial warrant, from any of the magistrates in [9] south Texas?

A No sir.

Q Did anyone think about getting a warrant?

A No sir.

Q Now, the information was that this truck – was this a farm truck?

A It was a stake bed truck, yes sir.

Q Is this a usual farm truck that hauls produce and other material, merchandise?

A I would think so.

Q Did it have the sideboards and –

A Yes.

THE COURT: Did you see the trucks later on?

A Yes, we saw the truck.

THE COURT: You saw the truck yourself?

A Not that night but after the seizure.

Q Is it a common farm truck?

[9] [10]

A Yes.

Q Now, when you say would be coming on 493 from Donna, does that road come from Donna Farm to Market Road 493?

A Yes.

Q And then you crossed U.S. 281 which is the Federal Highway that parallels the river along the valley?

[10] A Right.

Q That is what is referred to as Spur 281?

A He went on 281 from 493.

Q And the information was that this truck was going down to the river?

A Down to the river.

Q Did you yourself personally follow this truck?

A No.

MR. PENA: No further questions, Your Honor.

MR. LEWIS: No further questions.

THE COURT: Step down.

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THE COURT: Call your next witness.

[10] [11]

MR. LEWIS: Agent Mc Anear.

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[11] ROBERT MC ANEAR, called as a witness by the Government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LEWIS:

Q Will you state your name, please, sir, for the record?

A Robert Mc Anear.

Q Mr. Mc Anear, with whom are you employed?

A U.S. Custom's Patrol, McAllen.

Q How long have you been employed by that agency, sir?

A Seven years.

Q Okay, sir. I ask you to direct your attention to the day of July 14, 1976. Were you acting in the capacity of a custom's patrol officer on that day?

A Yes sir, I was.

Q Did you receive any instructions from any supervisors about establishing surveillance on that day?

A Yes sir.

Q What were you told to do?

[11] [12]

A We were told to go down in the area of Farm to Market Road 493 and 281, in an area called Jackson Farms and Donna Pump and watch for a stake bed truck that might be coming in that direction.

[12] Q Okay, sir. I ask you to go to this bulletin board over here on your right and draw an area where you went down there, where you were asked to go.

THE COURT: Draw the river and 281 and then 493.

A This would be the river area and this would be Highway 281, East and West. 493 going North would be down like this.

Q Okay, sir. Would you indicate lettering these lines that you are drawing what they represent?

Okay, sir. Where were you setting up surveillance on that evening?

A We set up right about here. Just about 50 feet from 493 and about a 100 feet or so north of 281.

Q Okay. What lies between the intersection of 493 and 281 and the river?

A In this area here?

Q Yes sir.

A Open field. There is a levee that comes along here. There is a canal that goes to Donna Pump right along here. This levee continues on around and goes across right – roughly this river should go here – and the levee continues on parallel with the river here.

Q About how far is it between the intersection of 493 and 281 to the river at it's closest point?

[13] A About half a mile.

Q Are there other roads leading to the river from 281?

A Yes sir, there is one that goes here to the levee, crosses, goes back up and to the river by the pump. There is a road on either side of the canal. There is a road that goes to Jackson Farms, crosses the levee down to the farm houses. There is a – I believe two other roads, field roads, that go down to this area to where the river curves back close to the levee.

Q Okay. What direction are you going to when you go to the left on 281? What town are you going to?

A Going east toward Progreso, Brownsville.

Q Okay. Would you put an "East" up there? And then as you go west, where are you going?

A West, toward Hidalgo – well, toward Hidalgo.

Q Okay. Were you given a particular description of a truck?

A Yes sir. It was supposed to be a white stake bed truck with specific license on it.

Q Do you remember that license number right off?

A DW-2810.

Q Okay. Now, before you started lettering on this drawing you were about to tell us where you and your partner set up surveillance, and at this time I will ask you to go [14] on with that testimony.

A Yes. There is a group of farm buildings, there is a school and a group of farm buildings right here. When we were set up, about to set up right here in this area, spot on set up –

Q Okay, sir, and what did you see?

A As we were about 50 foot from the pavement, looked around and there was a white stake bed truck.

Q Could you see the license plate on it?

A No, I could not.

Q Which direction was the truck going?

A It was going south.

THE COURT: Towards the river.

Q On what road?

A On 493 to the intersection there, sir.

Q Okay, what happened after it got to the intersection?

A It stopped at the stop sign and turned to the right or to the west and proceeded west.

Q Okay, sir. About what time of the evening was that?

A It's about five minutes 'till 9:00.

Q Okay, what happened after that?

A My partner was driving the vehicle that we were using for surveillance at the time, and I was on the ground

[15] talking to a man when the truck went by and turned to the west. He backed out and followed the truck to see where it was going.

Q Okay, sir. Do you know where they went?

A The truck and later officer Benjamin told me that they went toward the canal and for fear that they might alert the driver of the truck, when he saw the truck go over the canal, he said that when he saw it go over the canal he turned around and came back.

Q Okay.

The truck was still on 281 when he last saw it?

A Right.

Q Okay. Did he return to your position where you were there?

A Yes.

Q Did you all stay in that position for a substantial amount of time?

A Yes sir, we did.

Q Pardon me?

A I am sorry, until we were relieved.

Q Okay. About what time was that?

A I believe that was around roughly 1:00 o'clock or 12:30-1:00 o'clock.

Q Okay. Did you see any other vehicles driving up and down 493 that evening?

A Yes sir.

Q Okay. Were you given information about the possible existence of a second vehicle?

A Yes sir.

Q What were you told about that second vehicle?

A There was no description on it, that it possibly would be close to the truck.

Q Okay, sir. Did you see another truck that evening?

A Yes sir.

Q Okay, what was it doing?

A The first time I noticed it it was coming south on 493 to 281. Then it turned to the west. I believe the first time I lost it.

Q Did you see it thereafter?

A Yes, another time it came going east on 281.

Q Did it go down 493 that time?

A I don't recall whether it was that time or another time. Another time it did come north on 493 as I recall.

Q Okay. About how many times did you see that pickup truck that evening?

A At least three. At least three times that I know of.

Q Do you know if your partner saw it anymore times [17] than that?

A I don't know, sir.

Q Okay, sir. But it did pass your location about three times?

A Yes sir.

MR. LEWIS: Okay. No further questions.

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CROSS EXAMINATION

BY MR. PENA:

Q Mr. Mc Anear, will you please locate on the map the town north of the intersection where you were? Is it Weslaco or Pharr?

A This would be Donna.

Q Donna?

A Yes sir.

Q And do you know the distance between Donna and the intersection of 281 and 493 approximately?

A Approximately six or seven miles.

Q Would you indicate that on the map in parenthesis?

Now, do you know the distance between – does 493 go on to the river straight south?

A No sir, it dead ends right here.

Q Does 493 at any point on 281 go south to the river?

A No sir, it dead ends at 281.

[18] Q When we say 493, is that a farm to Market Road?

A Yes, a paved farm to Market Road.

Q Hard surface?

A Yes sir, paved.

Q And it dead ends at the intersection and you either go east or west?

A Yes sir, you either have to go east or west. You can't go across the street.

Q From the intersection to the river, do you know the distance between the two points?

A From this point to the river?

Q Yes, or from the farm road that leads to the river, which is what, Jackson Road you said?

A Yes sir. Here it's about – from here to the river it's about three quarters of a mile because the river makes a slight bend.

Q All right, sir. What is the first road west of the intersection of 281 and 493? That first road that you have designated on the map?

A This is referred to as Run Road. There is a run, R-U-N.

Q There is also a county school, a common school district?

A Yes, Run school.

Q Is that R-U-N-N-?

[19] A One sign it is R-U-N, on another sign it is R-U-N-N-. On the schoolhouse it is R-U-N-N. On the Highway it is R-U-N.

Q Does that road go on to the river?

A Yes sir, it goes up and winds around and cuts around through a farm house and goes over back fields to the river.

Q And lastly, what kind of surface do we have on that road?

A To this point it is paved, and from this portion here over to almost to the pump it is paved.

Q All right. Would you say that that's the most commonly used road for anyone going to the pumps, the Donna pumps?

A It would depend on whose going there.

Q A farm truck going to the pumps or to that area for harvesting or loading of any type of merchandise?

A I don't recall seeing too many farm trucks going to the pump.

Q Did you see other farm trucks that night during the time of your surveillance?

A I believe that there was one other pickup.

Q A pickup truck?

A Yes sir.

Q This was between 8:00 o'clock at night and what [20] hour were you relieved at?

A Roughly 12:30 or 1:00.

Q And you saw only one other farm to Market – one other pickup truck?

A That I can distinctly recall, yes.

Q Is U.S. 281 heavily traveled, used for people traveling east and west?

A It varies with the season. Sometimes it is, sometimes it isn't.

Q This time of the year, was it?

A I'm sorry?

Q This time of the year?

A This time of the year when this occurred?

Q Yes sir.

A It was slow that particular night. That night it was particularly slow.

Q Finally, Mr. Mc Anear, when you were asked to take

surveillance, was this a typical surveillance night? Is this ordinarily the time you take surveillance at that point or were you asked particularly to take surveillance that night?

A We were asked particularly to – I'm sorry – I particularly?

Q Yes.

A Everybody on the shift was.

Q I see. Would anyone else – would you do it every night?

A If we had information we would.

Q What was the information relayed to you? That the narcotics would come that night or the following day?

A It was supposed to be coming sometime in the morning, early morning hours.

Q And who relayed this information to you?

A I believe it was shift supervisor, and I don't recall.

Q Was it Mr. Foster?

A It could have been Mr. Foster. I don't remember whether it was him or not.

Q And you were to particularly await the contraband the early hours of the morning or the following morning?

A No sir. I was to go down during my shift and watch for the vehicles come out.

Q All right. And then getting to the truck, this farm truck, you did see it travel south from 493 to the intersection at about 8:55 P.M.?

A Farm truck?

Q The stake bed?

A Yes sir.

Q And then it went west from the intersection?

A Yes sir.

Q Did it go past the first road, Run Road?

A I could not see that particular road there. There were buildings along here and my partner was following him, so I didn't pay any attention.

Q But you did testify on direct testimony that it did go over that canal? That's the canal you indicated next to Run Road?

A This is what my partner told me.

Q So did it not get on Run Road or the canal road south to the river?

A Right. As I say, Officer Benjamin said it went across over the hump of the canal continuing west.

Q And he didn't follow it, whether or not it went on to the river at any point?

A No sir.

[22] [23]

Q Do you have any information whether or not this truck ever went south?

A No sir.

MR. PENA: That's all, Your Honor.

THE COURT: All right.

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[23] REDIRECT EXAMINATION

BY MR. LEWIS:

Q Mr. Mc Anear, this second truck, not the stake bed but the other truck –

A Yes sir.

Q – That you say passed your position about three times that evening, can you give us a generalized description of it?

A It's one of the pickup type trucks with a double cab to it or the elongated cab, what they call the super, has a seat behind the regular seat in the cab.

Q Do you know what color?

A It appeared to be kind of a tan color.

Q Well, light as opposed to dark?

A Oh, yes sir, lighter than dark.

Q Do you know whether or not it had any sort of accessory communications equipment on it?

[23] [24]

A Yes sir, it had C.B. antennas on it.

MR. LEWIS: No further questions, Your Honor.

MR. PENA: Nothing else, Your Honor.

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THE COURT: Call your next witness.

MR. LEWIS: Romy Perpetua.

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[24] ROMY PERPETUA, called as a witness by the Government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LEWIS:

Q Will you state your name, please, sir?

A Romy Perpetua.

Q Mr. Perpetua, how are you employed?

A Custom's Patrol Officer out of McAllen office.

Q How long have you held that position, sir?

A I've been in the patrol for about six years now. Little over six years.

Q Okay. I ask you to return your attention to July 14, 1976. On that evening, sir, did you have occasion to do anything with regards to this case?

[24] [25]

A Yes sir.

Q Could you tell us about that, please?

A I was delegated as the acting supervisor that night, and I had some information that a certain truck will pick up a load.

Q Were you given a description of the truck?

A Yes sir.

Q What was that description?

A It was a stake truck with a license number 2810. I believe it was Delta Uniform.

[25] Q D-W?

A Delta Whiskey.

Q Delta Whiskey, and it was a stake. Is that the same as stake bed truck?

A Stake bed truck, yes sir.

Q Pursuant to that information did you go out and assist or help organize surveillance?

A Yes sir.

Q Where were you stationed?

A I was parked inside the Krenmueller Farm area there.

Q Okay. I direct your attention to this drawing over your right-hand shoulder. Does that approximate the general area where you established your surveillance?

[25] [26]

A Yes sir.

Q By looking at that map, can you go over there and by using a marker indicate where you were that evening?

A (Witness indicating.)

Q All right, sir. What is the name of that road that runs on to 281 near your position?

A It's a farm road that goes straight down to the river.

Q Okay. Now, the way it is drawn there it doesn't go all the way to the river. Does it continue on after that?

[26] A If this is the canal, they should have another road here that goes to Jackson Farm.

Q Okay.

A Or is this the one that –

Q Okay. Well, It's say the one where you put your "X" is the one that goes to the Jackson Farm. Is it your testimony that the road that you were on goes right to the river?

A Yes sir, the road on the Krenmueller Farm.

Q Okay. Would you draw it in there, please?

A If this is the Jackson Road?

Q Yes sir, if that's Jackson Road.

A Well, this is a mistake. I was parked in this area here where this – it's a farm shed and some houses.

[26] [27]

Q Okay. And what does that road do?

A It goes down straight to the levee and forks off to the right, right along the river.

Q Okay, it runs up to what we will call the area or the banks of the river?

A Yes sir.

Q Okay. Were you given information about a second truck that might be assisting this loading operation?

A Yes sir. It was an unidentified vehicle but there was supposed to be another one that would act as reconnaissance.

[27] Q Okay, sir. You can regain your seat.

About what time of the evening did you establish surveillance?

A At about 2:00 A.M.

Q Okay. And would you tell us what you saw with regards to this case?

A Shortly after 2:00 A.M. on the 15th we observed a pickup truck with a stretch cab.

Q Stretch cab pickup truck?

A Yes sir.

Q Do you remember what color the truck was?

A It was light green or something like – it was light colored.

[27] [28]

Q It was a light colored truck as opposed to a dark one?

A Yes.

Q Do you remember whether or not it had any special communication equipment on it?

A Yes sir. I noticed when it passed it had a C.B. antenna.

Q C.B. antenna?

A Yes.

Q What was that truck doing?

A Going back and forth our position there.

Q Back and forth 281 or –

[28] A Back and forth on 281.

Q On 281. About how many times did it pass by your position? Do you know?

A I'd say at least six times.

Q Okay. In the drug industry, trade, is that sometimes known as making heat runs?

A Yes sir.

Q Did you all have information that that second truck might be doing just that very thing?

A Yes sir.

Q Okay. Did you ever see the stake bed truck that evening?

A Yes sir.

Q Would you tell us about that, please?

A At about 4:40 or somewhere around there, the last pass that the pickup truck made my position, I got out of my vehicle, I tried to get a good view of where he was going, and when I got out I observed this truck pulling in behind the pickup truck or ahead of the pickup truck.

Q The stake bed truck pulling in ahead of the pickup truck?

A Yes sir.

Q Which way was the pickup truck going at that point?

A East at that time.

[29] Q It was heading east away from you?

A Yes sir.

Q And where did the stake bed truck come out of?

A It appeared that it came out of Jackson Farm.

Q Okay. Is Jackson Farms the road where you wrote that "X" that you scratched out?

A Yes sir.

Q Would you go up there and write "Jackson Farms," please?

Okay. Now, there are a lot of farms back in that particular area of the Rio Grande River, are there not?

A Yes sir.

Q Are there other type of activities that go on back there, however?

A At that time, no sir.

Q Okay. That may be in reference to farming operations, but are there illegal activities that go on back there?

A All the time, sir.

MR. PENA: Your Honor, we object to that as being immaterial to this matter.

THE COURT: Overruled.

Q Is that place well known or is not well known as one of the principal contraband areas of the Rio Grande River?

[30] A Yes sir.

Q What else is near there, sir? A pump?

A Yes sir.

Q What is that called?

A Donna Pump and Canal.

Q I'm sorry.

A Donna Pump.

Q And where is that on that map?

A That is indicated – if this is the canal here and levee, the pump would be right around here.

Q Okay. Is that a well known contraband area?

A Yes sir.

Q Okay. Now, you say that around 4:40, I believe, you saw the stake bed truck pull out of the Jackson Farm Road?

A Yes sir.

Q And it pulled out right behind the pickup truck or was it right in front of it?

A It was right in front of it.

Q Okay. And then what did those two vehicles do?

A Proceed east.

Q Okay. Where did that stake bed truck come from?

A Judging by his taillights, his taillight appeared to be coming from the south.

Q Well, would it indicate that he made a turn off of [31] Jackson Road on to 281?

A Yes sir.

Q Do you know if those farms back there have operations going on wee hours of the morning, 4:00 o'clock in the morning?

A It's very seldom, sir, unless they have harvest which is in the summertime.

Q I'm sorry, I didn't understand you?

A If they have harvest going on, they have melon harvest going on in the summertime.

Q Were they doing melon harvest that night?

A No sir.

Q Where did those two vehicles go traveling in tandem?

A After I had left my position I followed, and by the time I caught up with them they were in this area here and the pickup truck, by the time I had a good view, by the time I gained a view of it, the pickup truck was proceeding east, continuing east on 281, and the stake bed truck turned north on 493.

Q Okay. And then what happened?

A We made an attempt to stop the pickup truck which was heading east, and my unit and another unit followed the truck and stopped them about two and a half or two miles north of 281 on 493.

[32] Q Followed the stake bed truck?

A Yes sir.

Q Okay. And the pickup truck went on east on 281?

A Yes sir.

Q Okay. When you stopped the pickup truck, what did you find? What did you do?

A As I got out of my vehicle, sir, I noticed a very strong odor of marijuana.

THE COURT: That's the stake bed truck?

MR. LEWIS: I'm sorry. That should read when you stopped the stake bed truck, what did you do?

Would you regain your seat, please?

You detected a strong odor of marijuana?

A Yes sir.

Q Then what did you do?

A I proceeded to go in the truck, take a look at the inside of it, and discovered some sacks, that some of them were outside of the canvas that was covering the rest of it.

Q Okay. There was canvas on the back of the truck?

A Yes sir.

Q And did you look under that canvas?

A Yes sir.

Q And what did you find?

 A I found sacks full of marijuana, bricks.

Q Lot of sacks or just a few sacks?

A Yes sir.

Q Did you then take the defendant into custody?

A Yes sir.

Q Did you advise him of his Miranda Rights?

A The other persons did that?

Q Okay. Other people were on the scene helping you with the search and the arrest?

A Yes sir.

Q Do you know whether or not the defendant made any statement to any of the officers?

A At that time, no sir.

Q You don't know or he didn't make any statements?

A I don't know, sir.

Q You don't know if he made any statements?

A No sir.

MR. LEWIS: Okay, pass the witness.

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[34] CROSS EXAMINATION

BY MR. PENA:

Q Mr. Perpetua, I think on Direct Examination you told Mr. Lewis that the truck, this stake bed truck, appeared to come out of the Jackson Road?

A Yes sir.

Q Road, is that it?

A Yes sir.

Q Now, Jackson Road is the Road next to the intersection where you were, not the one where you were, is that right?

A Yes sir.

Q Can you give us the approximate distance between the two roads?

A I would say about maybe two-tenths of a mile.

Q About a quarter of a mile?

A More or less.

Q All right, sir. Now, will you step up to the board one more time and put a letter "A" by the position where you were? At the position where you were, a capital letter "A"? Marking the position where you were?

All right, sir, and will you put a – is that Krenmueller Road?

A Yes sir.

Q Will you put a "K" or "C" so we will know what
[35] road it is?

All right, sir. And does the canal up ahead west of that, of either of those points, does that have a road that goes toward the river on top of the canal?

A This one, sir?

Q Yes.

A Yes sir.

Q Would you put "Canal" by the canal road?

Finally, will you put the letter "B" about the point on 493 where you stopped the farm truck?

A This is the first floodway and this is the floodway, and we stopped it about a quarter of a mile, maybe more.

Q All right, sir. Will you take your seat now?

Now, Mr. Perpetua, I believe you told Mr. Lewis that it was 4:40 in the morning when you saw the truck for the first time?

A Approximately 4:40.

Q Had you seen it earlier that night?

A No sir.

Q What time did you take your position?

A About 2:00 o'clock.

Q 2:00 o'clock in the morning?

A Yes sir.

Q So you hadn't seen the truck go by at all?

[36] A No sir. The only information I had is that the truck was sighted earlier.

Q The truck had been seen around 9:00 o'clock the night before?

A Yes sir.

Q Traveling on 281 east and west?

A Yes sir.

Q All right, sir. Had you had any information that this truck had gone south?

A No sir.

Q Did you tell Mr. Lewis that that road where you were, which is Krenmueller Farm Road – that goes to the river, does it not?

A Yes sir.

Q What about Jackson Road? Does that go to the river?

A Yes sir. It ends up on the levee which has connections to the river.

Q I see. You can get on the levee – I see.

A Either you go west or east, and you go down and it will lead you to the river.

Q And you have indicated there are a number of farms in that area?

A Yes sir.

Q This was 4:40 in the morning. Is that still dark?

[37] A Yes sir.

Q Therefore you have told us that you saw this truck come out of what appeared to be Jackson Road at about 4:40 in the morning, and you were at a point about two-miles west of that point?

A Yes sir.

Q All right, sir. And you do remember that the truck was ahead of a pickup truck?

A Yes sir.

Q Could you tell if this was the same truck that had been seen earlier at that point?

A I observed the white side of the truck through the head-lights of the pickup truck. It appeared that it was a stake bed truck. It just looked familiar.

Q And you could see this at point two-miles away?

A Yes sir.

[37] [38]

Q What about the pickup truck? Was it the same pickup truck you had observed going by earlier?

A It appeared to be, sir. It had the loud muffler and radio antenna.

Q And you were point two-miles away?

A Yes sir.

Q You say how far that the truck traveled ahead but at that time the truck went north on 493?

A The stake truck, sir.

[38] Q Yes. And the pickup truck went on east?

A Yes sir.

Q Or they separated, they didn't follow together?

A Right, sir.

Q All right, sir. And you pursued the pickup truck?

MR. LEWIS: Your Honor, we are going to object to that. He stated he pursued the stake bed truck.

Q Oh, did anyone pursue the stake bed truck?

A Yes sir, I had another unit that made an attempt.

Q Did they stop the driver and inquire?

A No sir, they were unable to catch up with it.

[38] [39]

Q They never stopped it?

A They couldn't. It escaped before they made a big curve 281.

Q But you did leave your position and travel east and then north and did stop the truck, the farm truck?

A Yes sir.

Q Driven by this defendant?

A Yes sir.

Q Did you make a report of this matter? Did you yourself make a report?

A We have an officer that was designated to make that report.

[39] Q Was that Mr. Foster?

A Mr. Coleman.

Q Mr. Coleman?

A Yes sir.

Q All right, sir. Do you recall telling Mr. Coleman that you had smelled an odor of marijuana coming out of that truck that night?

A Yes sir.

Q If he failed to put it in his report, is that an oversight on his part?

A Possibly, sir.

Q This is not something that you have developed, that you have testified to today?

A No sir.

Q You definitely smelled an odor of marijuana coming out of that truck that night?

A Yes sir.

Q And if he didn't put it in his report that was an error on his part?

A Possibly, sir.

Q How did you stop the truck driven by this defendant?

A With our red lights and siren, sir.

Q And he did stop, pulled over to the side?

A Yes sir.

[40] Q Did you ask him to leave the truck?

A Yes sir. The other officer asked him to get off the truck.

Q All right. And now you remember that there was an odor of marijuana coming out of that truck?

A Yes sir.

Q You did say that during the summer there is harvest in those farms?

A Yes sir.

Q And this was in first of August, was it?

A No, sir, earlier than that.

Q Earlier than August, in July?

A I couldn't tell exactly when.

Q And there is at least one major farm along that road, Jackson Road?

A Yes sir, both sides.

MR. PENA: That's all, Your Honor.

MR. LEWIS: No further questions, Your Honor.

THE COURT: Step down.

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MR. LEWIS: Agent Coleman.

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[41] ALFREDO A. COLEMAN, called as a witness by the Government, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. LEWIS:

Q Will you state your name, please, for the record?

A Alfredo A. Coleman.

Q Mr. Coleman, with whom are you employed?

A U.S. Customs.

Q How long have you been employed with that agency, sir?

A Five years.

Q I ask you to direct your attention to the evening of July 14, 1976. Were you on duty as a Custom's officer in that evening, sir?

A Yes sir.

Q And the following morning of July 15th, were you also on duty as a Custom's officer?

A Yes sir.

A Yes sir.

Q Were you as a Custom's officer requested to go out to certain area of 281 and assist in surveillance?

A Yes sir.

Q Would you tell us about that, please?

A We relieved the 6:00 to 2:00 shift, the earlier [42] shift. We established surveillance on the intersection of 493 and 281 about a mile north of 493.

Q Okay, sir.

What did you see there in your position?

A We saw a light colored pickup pass our position couple times heading south.

Q Excuse me. Can you give us anymore specific description but the light colored pickup?

A It was a light colored pickup with a double cab, you know, extended type version.

Q A type of stretch cab?

A Yes sir.

Q Could you tell whether or not this light colored pickup with the strect cab had any sort of accessory communication gear or devices on it?

A We did spot an antenna which appeared to be a C.B. type.

Q Okay, sir. I direct your attention to the drawing over there. Will you indicate to us where you took up your surveillance on that drawing?

A Yes sir. You want me to step up –

Q Yes, there's a marker down there. That's the river up there at the top, and north is to the bottom.

A We were about a mile north from the intersection of 281 and 493. Make it somewhere along around in here.

[43] Q Okay. And the pickup, this light colored pickup, was passing your position going –

A Going south.

[43]

Q South. Did you ever see it passing your position going north?

A No sir. Always going south.

Q Did it appear to you to be the same truck?

A Yes sir.

Q Okay. Did you see any other trucks that evening that had anything to do with this case?

A We did not see any other truck, but the shift that we relieved informed us when we set up this position that there was a stake bed truck.

Q Okay, sir.

A That headed south.

Q Earlier in the evening?

A Earlier in the evening.

Q Did you have occasion to see that pickup truck with a stake bed truck that evening?

A Yes sir.

Q And where was that?

A As we were proceeding west on 281 we saw a stake bed truck proceeding east and a pickup behind it.

Q About what time in the morning was that?

A This was in the early morning around 4:00 shortly
[44] thereafter.

Q Okay. Why was it you left your position of 493?

A The last time the pickup –

Q The light colored pickup?

A Light colored pickup left our position, we determined to try to get a license plate on it and to see what we could get on 10-28. And as we were heading – we had another unit stationed up here – saw the light colored pickup heading back east, and we were going up there to get a license plate on it.

Q It was going the opposite direction from where you were going?

A The opposite direction. It was heading east and we were heading west.

Q On 281?

A Yes sir. At this time we saw the stake bed truck in front of the pickup and which matched the license plate number and the color and description of the vehicle that we were looking for.

Q The stake bed?

A The stake bed truck.

Q And were any signals being passed back and forth between the stake bed and the light colored pickup truck?

A They appeared to be together. There were no

[45] signals as such that we saw. We did see the pickup. When we made the "U" turn to go after the stake truck, we could see the pickup pull over the levee on the highway and pull off to the side of the road and turn off it's lights. Then it would turn them on few seconds later, and then proceeded at a high rate of speed east on 281. And it appeared like he tried to, for us to go after him, you know, make it – in my opinion.

Q That he was trying to be a red herring or chase rabbit?

A Yes sir.

And that the stake bed truck went up to the intersection of 493, turned north, and we went after the stake bed truck and we called the other unit, and the pickup ran at a high rate of speed on 281.

MR. LEWIS: Okay, Sir.

No further questions.

Thank you.

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[46] CROSS EXAMINATION

BY MR. PENA:

Q Take your seat for a moment, Mr. Coleman.

You said that there was a C.B. antenna appeared to be on the pickup truck?

A Yes sir.

Q Did you find any such equipment on the truck, on the stake bed truck? You saw it on the pickup. Was there one on the farm truck?

A I don't recall seeing one on the stake truck.

Q Well, do you have a radio, a C.B. radio in your car?

A No sir.

Q Any other cars? On your patrol car?

A Yes.

Q Did you ever intercept any communications between this pickup and some other vehicle?

A I don't understand the question, sir.

THE COURT: You have a C.B. radio on your car?

A Yes.

THE COURT: Citizen's band?

A Oh, see, I misunderstood the question.

Q Did you ever listen in on any of the conversation, if any, between the pickup truck and any other vehicle?

[47] A Oh, no, no, no.

Q Can you do that on your radio?

A No.

[47]

Q Now, how do you relate the pickup truck to this farm truck driven by this defendant except that you saw it close together at one point?

A Yes, the truck was driving around in the early part of the morning.

Q You say the truck, the pickup truck?

A The pickup truck. Excuse me, the pickup truck.

Q But you had not seen the farm truck at all?

A The stake truck?

Q The stake bed truck, had you seen it all earlier?

A No.

Q And when you first saw it, it was coming east from the west on U.S. 281, is that correct?

A Yes, that's correct.

Q All right, sir. And you saw the pickup truck following the truck?

A Yes.

Q Could you tell if this was the same pickup truck that you had seen earlier?

A It appeared to be the same pickup truck.

Q But you are not sure or you weren't sure?

A Well, not – it appeared to be.

[48] Q But that pickup truck went on east and the truck went on north on 493?

A Yes sir.

THE COURT: And you told me that the people that you relieved, together with Mr. Mc Anear –

A And Mr. Benjamin.

THE COURT: – They told you that the stake bed truck that you were looking for had gone into that area?

A Had gone south.

Q At 9:44?

A In the earlier evening.

MR. PENA: That's all, Your Honor.

MR. LEWIS: No further questions, Your Honor.

The Government rests.

THE COURT: Step down.

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THE COURT: You rest?

MR. LEWIS: Yes.

MR. PENA: Your Honor, we would have no evidence

except with the Court's permission, to ask Mr. Foster to return to tell us if he can give us the name of the informant only. If [49] Your Honor rules that the informant's identity can be disclosed to him.

And the purpose, Your Honor, is to see if that informant who was not a reliable informant, not a paid informant at that point, whether or not he overheard –

THE COURT: Just a good citizen doing his duty.

MR. PENA: Whether or not, Your Honor, that informant could tell us whether or not he heard the name of this defendant, whether or not this defendant participated in that conversation.

MR. LEWIS: Your Honor, the law on this is clear. The defendant does not have the right to discover the name of the informant on Motion to Suppress.

THE COURT: You can put him back on for any questions you want to ask him.

MR. PENA: We call Mr. Foster, Your Honor.

MR. LEWIS: Your Honor, with regard to the law on the informer and purposes of Motion to Suppress, we refer the Court to United States v. Mendoza at 433 Fed. 2d 891; United States v. Gonzalez, 424 Fed. 2d 963; both Fifth Circuit cases.

[50] CLIFFORD FOSTER, a witness who had previously testified herein, was at this time recalled by the defendant, and testified further as follows:

DIRECT EXAMINATION

BY MR. PENA:

Q Mr. Foster, just a couple of questions, sir. You are the same Foster that testified earlier this afternoon? Mr. Foster, you indicated to the Court earlier that someone had called you and given you information about this contraband coming over from Mexico that night?

A Uh-huh.

Q All right. And you received this call about 6:00 o'clock in the afternoon?

A Yes sir.

Q Did you indicate to us that this contraband come over that night or in the morning?

A Sometime during the night, sir.

Q Do you know now the name of that informant?

MR. LEWIS: Your Honor, we would object to that question on the grounds it may lead to the discovery of the informant. At this time we would assert the Government's privilege.

THE COURT: Do you know his name? Don't give us the name. Do you know his name?

A Yes sir.

[51] Q All right, sir. And did he indicate to you whether or not this defendant here had participated in that conversation you overheard?

A No sir.

Q Did he indicate whether or not the name of this defendant had been mentioned in that conversation?

A No sir.

Q Did he indicate to you where he had overheard the conversation?

A No sir.

THE COURT: You have already asked him that once.

MR. PENA: I'm sorry.

THE COURT: Let's don't have any repetition.

MR. PENA: I would like to, Your Honor, move on to the question whether or not he can give us the name of the informant.

THE COURT: He does not have to unless you show me that there is a need for it.

MR. PENA: Your Honor, for the record simply I will –

THE COURT: Do you know whether this man gave you this information participated in anyway in getting this contraband?

A I know that he didn't.

[52] THE COURT: You know that he did not?

A Yes.

MR. PENA: That he did not?

THE COURT: That he did not.

Q All right. Did he mention names of people in the conversation?

A No sir.

Q Would he know these people in the conversation?

A I don't know whether he would or not. He didn't indicate. He gave me the information which I had told you and that was all.

Q And he didn't say where he had heard this conversation except that earlier during the day?

A Right.

MR. PENA: We simply ask the Court to allow that, Your Honor. The Court overruled us. Note our exception.

THE COURT: Yes, your Motion for the name of the informer is overruled.

MR. PENA: Note our exception.

That's all, Your Honor.

THE COURT: I will carry it along with the case.

MR. PENA: We have no further evidence, Your Honor.

[53] MR. LEWIS: No further questions, Your Honor.

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THE COURT: All right, the Motion to Suppress is overruled. The evidence here before me – and I will write a little Memorandum later – the evidence before me is that the citizen who had never given information before called the Custom's Patrol Officer Foster and told him that he had overheard a conversation that a big load of marijuana was going to be brought in to this country through the Jackson Pump at the Rio Grande River which is the boundary between the United States and Mexico sometime that night and that there would be two vehicles, one of them, he said, the one that the contraband was going to be carried, was a white Dodge stake bed truck with a certain license number, and that there was another vehicle involved, that he didn't know the description of the other vehicle.

So Agent Foster passed this information on to his supervisor to set up surveillance out there by the area of the Jackson Pump; that the Jackson Pump – or that they had information that this truck was going up 493 to 281 and then proceed to the river. 493 comes from Donna, Texas, and does go to 281, and Highway 281 parallels the Rio Grande River.

The evidence where all this action took place shows that the river is about half a mile from Highway [54] 281, that there was farm land out there, that there is a flood levee between the river and 281, that there are several roads that lead to the river.

Custom's Patrol Officers around 9:00 o'clock at night did see this truck. The informant had told them was going to be used come up 493 to 281 and make a right turn on 281 going west. Then Officer Perpetua sometime in the early morning hours saw this truck come out from what appeared to him a road that leads to the river, at 4:30 A.M., after the officers had seen this truck at 9:00 o'clock, and follow a pickup truck that had been seen not by one officer but by several officers,

with a C.B. antenna making passes back and forth like dry runs. That would arouse the suspicion of anyone that a particular truck would be in that area where there is nothing but farms, that saw him for hours making runs back and forth on 281, 493, both times that officers saw this truck, both times it was going south, so here he was from around 10:00 o'clock at night to 4:00 o'clock in the morning or 4:30 in the morning, making all these runs there. And then when they saw this pickup he was following this stake bed truck that the informer had told him about.

No question in my mind that these officers had more than probable cause to stop and search this vehicle, that this is a border search, and the Custom's Officers, with [55] all the information they had and all the suspicious circumstances they had, they had more than sufficient reasons to stop this truck.

Your Motion to Suppress is denied.

MR. PENA: Your Honor, please, may we ask that the sketch drawn out by the witnesses be an Exhibit for the purpose of this Motion?

THE COURT: If you want to preserve it as an Exhibit you have to get the photograph.

MR. PENA: Well, Your Honor, we will take the sketch down and mark it and ask the Court to have it marked.

THE COURT: Make a picture of it. You are not going to take my –

MR. PENA: Excuse me. I thought that was a pullable folder.

THE COURT: No.

[55] [56]

MR. PENA: I will have a picture made.

THE COURT: If you want to take a picture, you can.

I will try this case September 1st. We will select a jury. The Motion is overruled and we will select a jury Monday – I mean Wednesday.

MR. LEWIS: Your Honor, counsel has indicated to me that they intend to waive a jury in this case and [56] submit the case to the Court on the basis of the evidence adduced at the Motion to Suppress, along with the stipulations that the seizure weighed 3,931 pounds.

THE COURT: And that it was marijuana?

MR. LEWIS: And it did in fact contain marijuana.

THE COURT: All right, come forward.

MR. LEWIS: Your Honor, we submit this case to the Court on Count Number 2 only.

THE COURT: I was going to find him not guilty on Count 1.

MR. LEWIS: We think a convincing argument –

THE COURT: I have no evidence that the sacks were Mexican marking. When I have evidence like that sometimes I extend myself, find it was brought from Mexico. But I don't believe anybody would be putting 3,000 pounds of American marijuana on the banks of the Rio Grande River to be taken to Mexico, see. So it's foolish to think that it didn't come from over there.

[56] [57]

All right. Now, Julian Herrera Mendoza, you speak English?

THE DEFENDANT: Yes.

THE COURT: Now, your lawyer filed a Motion for me to Suppress the evidence against you, and I have overruled that Motion. You understand?

[57] THE DEFENDANT: Yes sir.

THE COURT: All right. Now he tells me that you want to waive you right to a jury trial.

THE DEFENDANT: Yes sir.

THE COURT: And that you want to be tried to the Court. You understand?

THE DEFENDANT: Yes sir.

THE COURT: And that you want me to take the evidence that I heard here from these witnesses that just testified, plus the further stipulation that what you were caught with was in truth and in fact 3,931 pounds of marijuana, and that it was marijuana, and that you were willing to stipulate that that is true. Is that correct?

THE DEFENDANT: Yes sir.

THE COURT: Now, you understand that that is just like them coming here and telling me that weighed the stuff, chemist coming here and telling me that he tested it and it was marijuana.

But you are telling me that that is not necessary because you stipulate that when you were apprehended you were in

possession of this 3,900 and some odd pounds of marijuana?

THE DEFENDANT: Yes sir.

THE COURT: And that it was marijuana that you were carrying? You understand that?

[58] THE DEFENDANT: Yes sir.

THE COURT: Now, if you want to waive your right to a jury trial and be tried to the Court with this stipulation, why, you go ahead and sign that waiver.

MR. LEWIS: Your Honor, we would add the additional stipulation that the chain of custody was in order.

MR. PENA: We would agree.

THE COURT: I don't think that the chain of custody has to be in order if he agrees caught with it and that it was marijuana.

All right, Julian Herrera Mendoza, you have waived your right to a trial by jury. You have asked that I try you based on the evidence that I heard here, and the further stipulation that you were apprehened with 3,000 some odd pounds of marijuana that was marijuana, that if samples were taken and sent to the chemist, they would confirm it was marijuana.

Based on the evidence before me, I find you guilty as charged in Count 2 of this indictment of possessing with intent to distribute the marijuana. The amount of it shows that it was for commercial purposes and couldn't possibly be used for your own use. So I therefore find you guilty as charged in Count 2 of this indictment, of possessing with intent to distribute these 3,931 pounds of [59] marijuana.

Put this man under oath.

(Defendant sworn.)

THE COURT: Have you ever been in trouble with the law?

THE DEFENDANT: About five years ago.

THE COURT: Five years ago. For what?

THE DEFENDANT: They give me D.W.I.

THE COURT: Huh?

THE DEFENDANT: About five years ago.

THE COURT: For D.W.I.?

THE DEFENDANT: Yes.

THE COURT: You never have been arrested for drugs of any kind, marijuana?

THE DEFENDANT: No sir.

THE COURT: Where do you live, sir?

THE DEFENDANT: In Donna.

THE COURT: Donna?

THE DEFENDANT: Donna, Texas.

THE COURT: What do you do for a living besides hauling 3,900 some odd pounds of marijuana around?

[59] [60]

THE DEFENDANT: Work in the city.

THE COURT: In the city?

THE DEFENDANT: City of Donna.

THE COURT: City of Donna. In what depart- [60] ment?

THE DEFENDANT: Sanitation.

THE COURT: Sanitation?

THE DEFENDANT: Uh-huh.

THE COURT: This wasn't a city truck you were using, was it?

THE DEFENDANT: No sir.

THE COURT: I'm glad to hear that.

You have a family?

THE DEFENDANT: Yes.

THE COURT: Well, all right, I'm going to order a Pre-Sentence Report on you and I am going to continue you on your same bond, and I will sentence you here on June 30th – I mean September 30th at 9:30 A.M.

But before you leave here you have to talk to one of the probation officers. You understand? Talk to one of the probation officers.

And I will write a complete Memo on this, and I will have it ready to file before the sentencing.

[60] [61]

MR. PENA: Yes sir.

THE COURT: And you can make your record.

I do want to state one thing. That I don't want to cut you off from your right to have the name of the informant. You had no evidence to produce on that, did you?

MR. PENA: No, Your Honor.

[61] THE COURT: All right. Because the only evidence before me is that there was a man who had never given information, Officer Foster knows who the man is, because he told him, the man had never given him information, and Officer Foster tells me that he knows that the man had nothing to do with the picking up of the marijuana or bringing it over or anything like that.

There is a procedure that we can go through in chambers to find out whether the man did or did not, you know. But from the evidence that I have before me, absolutely no reason for this Court to make the Government produce the name of the informant.

(Court in recess at 3:08 P.M.)

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[62] PROCEEDINGS OF SEPTEMBER 30, 1976

2:37 P.M.

THE COURT: Now, Julian Herrera Mendoza, you appeared here before me on the 30th and I had a hearing on your Motion to Suppress, and I overruled your Motion, and then you waived a jury and asked to be tried to the Court, and I have found you guilty on Count 2 of this indictment, of possessing with intent to distribute this huge amount of marijuana, 3,931 pounds of marijuana.

What do you have to tell me before I pass sentence on you?

THE DEFENDANT: Judge, I'm sorry I made a mistake and I love my family, my wife. I don't got nobody to support them.

THE COURT: Well, you should have thought about that. I wonder how many people you were going to ruin with this marijuana, how many kids? You love your family. I wonder how many young people were going to smoke that pot that you were carrying in that truck.

I know that that marijuana wasn't yours, you know. That marijuana wasn't yours, was it? Was the marijuana yours?

THE DEFENDANT: No sir.

THE COURT: It wasn't, was it?

THE DEFENDANT: No sir.

[63] THE COURT: You were carrying it for somebody else? He's running around free, free as a bird.

Well, because of the huge amount of marijuana here I don't see how I could possibly give you probation. You cannot be given probation. If I don't make an example out of you there will be a lot of other people with kids and good records that will be hauling marijuana all over the country.

Anything else you want to tell me before I sentence you?

All right, on a finding of guilty by this Court I hereby sentence you to three years in the custody of the Attorney General, and a special term of parole of three years is hereby imposed upon you.

I must tell you that you have a right to appeal your conviction if you desire.

What kind of bond is this man out under?

MR. PENA: I think he has a ten-percent bond, Your Honor. He is an employee for the city, as Your Honor knows.

THE CLERK: $10,000.

MR. PENA: $10,000.

THE COURT: $10,000, ten percent?

THE CLERK: It is $10,000.

MR. LEWIS: $10,000, ten-percent bond.

[64] THE COURT: Ten-percent bond?

All right, if you want to appeal, if and when you file your Motion – your Notice of Appeal, and you make arrangements with this reporter to pay for the transcript, I will order

the Marshal to release you on your original bond. Arrangements have to be made with this reporter.

MR. PENA: If the Court please, may I say this? I had discussed this with him. I told him that he has a right to appeal. He has not finally decided to do that. In view of the Court's sentence, I am going to tell him that it is his decision.

Could Your Honor give us, though, ten days in which to make the decision? He does have some money on deposit authorizing me to pay for the costs with the reporter. He has a job. His wife is here.

THE COURT: All right, I will ask that he report to the Marshal here to start serving his sentence on October 12th unless by that time he has given his Notice of Appeal and arrangements have been made with the reporter.

All right.

MR. PENA: Thank you very much, Your Honor.

What hour, Your Honor?

THE COURT: Tuesday at 9:30. But if he doesn't report, check to see if the Notice of Appeal has been [65] filed with the clerk, and if arrangements have been made with the reporter for the transcript.

THE MARSHAL: Yes sir.

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[66]

[66] IN THE UNITED STATES DISTRICT COURT)

FOR THE SOUTHERN DISTRICT OF TEXAS)

I, Lloyd E. Horn, Official Court Reporter, United States District Court, Southern District of Texas, do hereby certify that I reported the proceedings had in the above styled and numbered cause on the 30th day of August, 1976 and the 30th day of September, 1976; that said proceedings were later reduced to typewriting under my personal supervision, and the above and foregoing 66 pages of typewriting constitute a true and correct transcript thereof.

Given under my official hand, this the 21st day of October, A.D. 1976.

/s/ Lloyd E. Horn
LLOYD E. HORN,
OFFICIAL COURT REPORTER